No. 10-1491

IN THE

Supreme Court of the United States

ESTHER KIOBEL, *individually and on behalf of her late husband,* DR. BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, CHARLES BARIDORN WIWA, ISRAEL PYAKENE NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS NWINEE, KPOBARI TUSIMA, *individually and on behalf of his late father,* CLEMENTE TUSIMA,

Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND TRADING COMPANY PLC, SHELL PETROLEUM DEVELOPMENT CO. OF NIGERIA, LTD.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR AMICI CURIAE THE NATIONAL FOREIGN TRADE COUNCIL, USA*ENGAGE, THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS, THE AMERICAN PETROLEUM INSTITUTE, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE ORGANIZATION FOR INTERNATIONAL INVESTMENT, AND THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The National Foreign Trade Council (NFTC) is the premier business organization advocating a rules-based world economy. Founded in 1914 by a group of American companies, NFTC and its affiliates now serve more than 250 member companies.

USA*Engage is a broad-based coalition representing organizations, companies, and individuals from all regions, sectors, and segments of our society concerned about the proliferation of unilateral foreign policy sanctions at the federal, state, and local level. Established in 1997, USA*Engage seeks to inform policymakers, opinion-leaders, and the public about the counterproductive nature of unilateral sanctions, the importance of exports and overseas investment for American competitiveness and jobs, and the role of American companies in promoting human rights and democracy worldwide.

The United States Council for International Business is a business advocacy and policy development group representing 300 global companies, accounting firms, law firms, and business associations. It is the U.S. affiliate of the International Chamber of Commerce, the International Organization of Employers, and the Business Industry Advisory Committee to the

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members, or their counsel made a monetary contribution to this brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

Organization for Economic Cooperation and Development.

The American Petroleum Institute (API) is a nationwide, not-for-profit trade association whose membership includes over 400 companies involved in all aspects of the oil and natural gas industry. API is a frequent advocate on important issues of public policy affecting its members' interests before courts, legislative bodies and other forums.

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 States. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

The Organization for International Investment (OFII) is the largest business association in the United States representing the interests of U.S. subsidiaries of international companies. Its member companies employ hundreds of thousands of workers in thousands of plants and locations throughout the United States. Members of OFII transact business throughout the United States and are affiliates of companies transacting business around the globe.

The American Insurance Association (AIA) is a leading national trade association that counts among its members many major property and casualty insurance companies writing business nationwide and globally. On issues of importance to the property and casualty insurance industry and marketplace, AIA advocates

sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and files amicus curiae briefs in significant cases before federal and state courts.

SUMMARY OF ARGUMENT

Amici agree with Respondents that corporations may not be held liable under the Alien Tort Statute (ATS) for the violations alleged. But even if the Court were to reject that contention, the judgment should be affirmed on the alternative ground that establishing aiding-and-abetting liability requires pleading and proving purpose to facilitate the direct violator's unlawful conduct, not mere knowledge of that conduct. This alternative ground for affirmance, which has been fully aired in conflicting courts of appeals decisions, formed the basis for Judge Leval's opinion below concurring in the dismissal of the complaint.

The conclusion that "purpose to facilitate" is the required mental element for aiding-and-abetting claims under the ATS flows directly from the standards for recognizing ATS claims established in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004). First, there is no international legal norm concerning the mental element of aiding and abetting that meets *Sosa*'s requirements of definiteness and universal acceptance, but the predominant view among States is that purpose is required. Nearly every leading source for determining the content of customary international law demonstrates that purpose to facilitate the violation, not knowledge alone, is required to establish aiding-and-abetting liability. Those sources include: the Rome Statute of the International Criminal Court, ratified by 120 States; the statute of the international criminal tribunal in East Timor, a U.N. body; a forty-year study of

legal principles governing State responsibility for torts carried out by the United Nations' International Law Commission, in extensive consultation with member governments; case law of the International Military Tribunal at Nuremberg; and opinions of foreign international-law experts. While there is some evidence for a knowledge standard in the case law of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, those are less persuasive sources for a number of reasons. And, in any event, they at most demonstrate that there is dispute or uncertainty with respect to the international legal rule. Under *Sosa* that might be a reason to reject aiding-and-abetting liability altogether, but it certainly mandates that if aiding-and-abetting liability is permitted, it must include a mental element no less demanding than purpose. *See infra* Parts II.B and II.C.1.

Second, *Sosa* held that even if an ATS claim rests on a specific and universally accepted international norm, several considerations mandate "judicial caution" in expanding ATS liability. 542 U.S. at 725. Each of those factors—the need for post-*Erie* restraint in exercising federal common law powers altogether, the danger of judicial decisions intruding into matters of foreign relations, and comity's counsel of respect for foreign judicial systems' ability to address these matters arising abroad—independently weighs strongly against recognition of a mental element for aiding and abetting any less demanding than purpose. *See infra* Part II.C.2.

ARGUMENT

I. AMICI AGREE WITH RESPONDENTS THAT CORPORATIONS MAY NOT BE HELD LIABLE UNDER THE ATS FOR THE ALLEGED VIOLATIONS

Amici fully endorse Respondents' contention that corporations may not be held liable under the ATS for the violations alleged. *See* Resp. Br. 16-48. As Respondents and numerous amici demonstrate, that conclusion is dictated by a straightforward application of the standards for recognizing ATS claims established in *Sosa*. First, for each of the norms alleged to be violated here, the evidence is far from adequate to demonstrate that States specifically and universally view the norm as legally binding on corporations. Second, even if there were sufficiently specific and universally accepted international legal norms against corporate conduct of the kind alleged, the factors identified by this Court for the exercise of restraint in expanding ATS liability weigh strongly against recognizing such claims. In particular, this Court's great caution with respect to judicial expansions of common-law liability counsels against recognizing corporate liability for the violations alleged. *Cf. Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61 (2001) (refusing to recognize *Bivens* action against private corporate prison operator).

II. EVEN IF THE COURT WERE TO FIND THAT CORPORATIONS MAY BE HELD LIABLE, THE JUDGMENT SHOULD BE AFFIRMED ON THE ALTERNATIVE GROUND THAT AIDING AND ABETTING THE VIOLATIONS ALLEGED REQUIRES THAT THE DEFENDANT ACTED WITH THE PURPOSE TO FACILITATE THE VIOLATIONS, WHICH WAS NOT PLEADED

Even if the Court were to find that corporations may be held liable for aiding and abetting the violations

alleged, the judgment should be affirmed on the alternative ground that establishing such liability requires pleading and proving purpose to facilitate the violations, not mere knowledge of the direct violator's conduct.

A. Affirmance On This Alternative Ground Would Be Appropriate

The Court has often relied on the well-established principle that a prevailing party may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *see also, e.g.*, *Bennett* v. *Spear*, 520 U.S. 154, 166 (1997) ("A respondent is entitled ... to defend the judgment on any ground supported by the record[.]"). This principle is both longstanding, *see, e.g.*, *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435-436 (1924), and of recent use, *see, e.g.*, *United States* v. *Tinklenberg*, 131 S. Ct. 2007, 2017 (2011); *Union Pac. R.R. Co.* v. *Brotherhood of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 130 S. Ct. 584, 595 (2009).

The case for affirmance on the alternative ground we identify here is compelling. *See* Resp. Br. 48-53. To begin with, the issue was raised below. Petitioners and Respondents briefed issues relating to aiding-and-abetting liability under the ATS, including mens rea, before both the district court and the court of appeals. *See, e.g.*, Appellees/Cross-Appellants' Br. 23-26 & n.9 (June 6, 2007) (discussing aiding-and-abetting liability under international law, including mens rea); Pls.-Appellants/Cross-Appellees' Reply Br. 15-28 (July 6, 2007) (same); Defs.' Mem. of Law on Issues of Interna-

tional Law Pursuant to the Court's Order of Oct. 7, 2008, at 62-66 (Dec. 12, 2008) (same); Pls.' Reply to Defs.' Mem. of Law on Issues of International Law 37-38 (Jan. 9, 2009) (same). Both the court of appeals' majority and Judge Leval in concurrence referred to the issue, and, indeed, agreed that purpose is the necessary measure of mens rea for aiding and abetting the international law violations alleged. *See, e.g.*, Pet. App. A-19 (noting that the court's opinion does not preclude suit against "a corporation's employees, managers, officers, directors, or any other person who commits, or purposefully aids and abets, violations of international law"); *id.* A-90 (Leval, J., concurring in the judgment) ("liability under the ATS for aiding and abetting a violation of international human rights lies only where the aider and abettor acts with a purpose to bring about the abuse of human rights" (emphases omitted)). Indeed, Judge Leval's opinion concurring in dismissal of the complaint rested precisely on this ground. *See id.* A-90 to A-91, A-167 to A-185 (explaining why he would dismiss the complaint for failure adequately to allege purpose). Accordingly, there is no question that the issue was raised and discussed in the proceedings below.

Several factors the Court has identified as supporting reliance on an alternative ground for affirmance weigh heavily in favor of reaching the alternative ground we identify here. First, this Court has looked to whether a proposed alternative ground is of "sufficient general importance to justify the grant of certiorari." *United States* v. *Nobles*, 422 U.S. 225, 241 n.16 (1975). That consideration carries substantial force here. The issue of the required mental state for aiding-and-abetting liability under the ATS represents an important and recurring question of law that has sharply

divided the circuits. *Compare Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244, 258-259 (2d Cir. 2007) (purpose is the required mens rea); *Aziz* v. *Alcolac, Inc.*, 658 F.3d 388, 399-400 (4th Cir. 2011) (same); and *Doe VIII* v. *Exxon Mobil Corp.*, 654 F.3d 11, 33-39 (D.C. Cir. 2011) (considering and rejecting the Second Circuit's position, holding that knowledge is sufficient); *Cabello* v. *Fernández-Larios*, 402 F.3d 1148, 1159 (11th Cir. 2005) (per curiam) (upholding jury verdict against foreign military officer for participating in execution of political prisoner apparently based on a knowledge standard for aiding and abetting torture, extrajudicial killing)[2]; *see also Sarei* v. *Rio Tinto, PLC*, 2011 WL 5041927, at *25 (9th Cir. Oct. 25, 2011) (en banc) (noting the "dispute" on the issue, and deciding that "*at least* purposive action in furtherance of a war crime constitutes aiding and abetting that crime.") Resolution of this divide appears unlikely absent intervention by this Court.

Second, in deciding whether to address alternative grounds, this Court has also looked to whether the "alternative ground" is outside or within "the scope of the question presented." *Archer* v. *Warner*, 538 U.S. 314, 322 (2003); *see Roberts* v. *Galen of Va., Inc.*, 525 U.S. 249, 253-254 (1999) (per curiam). Here, the second question presented is "[w]hether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide ... or if corporations may be sued in the same man-

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[2] *But see In re Chiquita Brands Int'l, Inc. Alien Tort Statute & Shareholder Derivative Litig.*, 792 F. Supp. 2d 1301, 1343 (S.D. Fla. 2011) (interpreting *Cabello* as consistent with *Talisman Energy* because "both use a *purpose* standard for secondary liability").

ner as any other private party defendant under the ATS for such egregious violations." Pet. i. The issue of the appropriate mental element for aiding-and-abetting liability under the ATS is necessarily subsumed by and bound up with the question's assumption that there can be underlying "tort liability" based only upon allegations of knowing aiding and abetting. *See also* S. Ct. R. 14.1(a) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein.").

Third, this is not a case where resolution of the alternative ground would implicate issues "committed to the ... discretion" of the trial court or the court of appeals, *Nobles*, 422 U.S. at 241 n.16, or that would require factbound assessments following "a careful examination of a voluminous record," *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 542 (1960); rather, the appropriate mental element for aiding-and-abetting liability under the ATS is a pure question of law subject to de novo review by this Court.

In short, there is much to be gained and little to be lost by addressing this important and pressing question of law now. It therefore would be "an appropriate exercise of [this Court's] discretion to consider" the issue of the requisite mens rea for aiding and abetting under the ATS "now rather than leave [the issue of law] for disposition on remand." *Bennett*, 520 U.S. at 167.

B. In Determining Whether Aiding And Abetting The Violations Alleged Is Cognizable Under The ATS, Courts Must Look To International, Not Domestic, Law

The court of appeals correctly held that "international law, and not domestic law, governs the scope of liability" under the ATS, just as much for claims of ac-

cessorial liability as for claims of direct liability. Pet. App. A-28. The ATS's terms dictate this approach; this Court recognized as much in *Sosa*; and this view also accords with the ATS's purpose. The overwhelming majority of lower courts to consider the issue have accordingly embraced this approach.

1. The ATS provides that the "district courts shall have original jurisdiction of any civil action by an alien for a tort only, *committed in violation of the law of nations or a treaty of the United States*." 28 U.S.C. §1350 (emphasis added). By its terms, the ATS thus directs that the scope of any claim brought under it must be defined with reference to international law.

2. This Court recognized as much in *Sosa*. There the Court held that the ATS gives the federal courts authority to recognize certain causes of action in the exercise of their limited federal common law power. But the contours of any claims so recognized, this Court explained, must be derived from international law. Again and again, the Court characterized any claims recognized under the ATS as "claim[s] based on the present-day law of nations." *Sosa*, 542 U.S. at 725; *see id.* at 727 (ATS claims are "private rights of action under an international norm"; ATS "mak[es] international rules privately actionable"); *id.* at 729 ("actionable international norms"); *id.* at 731 n.19 ("claims derived from the law of nations"). And it expressly recognized that international law must be the source for defining each aspect of a potential ATS claim, including, for example, "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued." *Id.* at 732 n.20.

3. The ATS's central purpose comports with this approach. That purpose was to demonstrate the new

Republic's commitment to the law of nations by providing aliens with judicial protection based on international standards they would expect to encounter anywhere in the world, rather than domestic rules specific to the United States. *See, e.g.*, Castro, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 488-498 (1986). This core goal would be defeated if the scope of liability under the ATS were defined with reference to domestic U.S. standards rather than universally accepted international ones.

4. The overwhelming majority of lower courts have accordingly looked to international, rather than domestic sources, in defining the terms of potential ATS liability, even when they have disagreed about the particular results of the required international-law inquiry. *See, e.g.*, *Sarei*, 2011 WL 5041927, at *5 ("The norms being applied under the ATS are international, not domestic ones, derived from international law."); *Aziz*, 658 F.3d at 395-396 (same); *Doe*, 654 F.3d at 29-30 ("Congress ... directed that ... courts derive the rule of law from the law of nations .... Because aiding and abetting liability implicates the character of the specific conduct allegedly committed by the defendants sued, the conduct must represent a violation of an international law norm[.]" (internal quotation marks and citation omitted)); *Talisman Energy*, 582 F.3d at 247 (same).

5. The considerations dictating resort to international law apply with just as much force to the definition of a potential ATS claim for aiding and abetting as to a potential claim for direct liability. Under international, as in U.S. domestic law, aiding and abetting a violation is a distinct tort or crime from the direct perpetration of an offense. *See, e.g.*, *Case Concerning the Application of the Convention on the Prevention and*

Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro) (*Bosnian Genocide Case*), Judgment, 2007 I.C.J. 47, ¶¶385-397, 416-424 (Feb. 26) (considering separately whether Serbia could be held directly responsible under Article 4 of the International Law Commission's Articles on State Responsibility and whether it could be held responsible for aiding and abetting under Article 16); *Prosecutor* v. *Ntagerura*, No. ICTR-99-46-A, ¶338 (Appeals Chamber July 7, 2006) ("criminal responsibility ... which leads to a conviction as the principal perpetrator of the crime[] has to be distinguished from aiding and abetting a crime"); *cf. Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176-177 (1994) (distinguishing aiding-and-abetting liability from direct liability). Thus, when a plaintiff brings a claim against a defendant for aiding and abetting, say, crimes against humanity, that is a distinct "tort ... committed in violation of the law of nations or a treaty of the United States," 28 U.S.C. §1350, from a claim of directly committing a crime against humanity. Accordingly, again, even the courts of appeals that are otherwise divided over the definition of aiding-and-abetting liability under the ATS agree on the need to look to international-law sources in defining the contours of such potential liability. *See Sarei*, 2011 WL 5041927, at *7 ("the inquiry into aiding and abetting liability is an international-law inquiry"); *Aziz*, 658 F.3d at 398 ("*Sosa* guides courts to international law to determine the standard for imposing accessorial liability"); *Doe*, 654 F.3d at 33 (courts must "look[] to customary international law to determine the standard for assessing aiding and abetting liability"); *Talisman Energy*, 582 F.3d at 259 ("*Sosa* and our precedents send us to international law to find the standard for accessorial liability").

C. To The Extent That Aiding And Abetting The Violations Alleged Is Actionable Under The ATS, An Element Of Aiding And Abetting Must Be Purpose To Facilitate The Violations

Assuming that corporations may be held liable under the ATS for aiding and abetting the violations alleged, such liability should be permissible only if a defendant acts with purpose to facilitate the principal's unlawful conduct. Mere knowledge or reckless disregard that the principal may violate international law cannot suffice.

This conclusion follows inexorably from the standards for recognizing ATS claims established in *Sosa* for two independently sufficient reasons. *First*, *Sosa* held that only those norms that are as definite and universally accepted as the three paradigm norms considered by the First Congress may form the basis for ATS claims. *See* 542 U.S. at 732. Petitioners ground their claims principally on customary international law, which means widespread State practice taken from a sense of legal obligation. *See* Pet. Br. 48-56; Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993 ("a general practice accepted as law"); *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 880-881 & n.8 (2d Cir. 1980) (describing Article 38 of the ICJ Statute as consistent with this Court's historical approach to sources of international law). If one looks to each of the leading sources of evidence for customary international law, they demonstrate that the predominant view among States is that purpose to facilitate the principal's unlawful conduct, not knowledge alone, is required to establish aiding-and-abetting liability. *Second*, the additional factors identified in *Sosa* for judicial restraint in expanding ATS liability—the post-*Erie* need for judicial humility in substantive lawmak-

ing in the absence of legislative guidance; the danger of judicial decisions intruding into matters of foreign relations; and respect for foreign States' ability to address matters arising within their own borders—all point in favor of a mens rea standard for aiding and abetting no less demanding than purpose.

1. **There is no international legal norm concerning the mental element of aiding and abetting that meets *Sosa*'s requirements of definiteness and universal acceptance, but "purpose to facilitate" is the predominant standard**

Nearly every leading source for determining the content of customary international law demonstrates that the predominant view among States is that purpose to facilitate the principal's unlawful conduct, not knowledge alone, is required to establish aiding-and-abetting liability. Those sources include: the Rome Statute of the International Criminal Court (ICC), ratified by 120 States; the statute of the international criminal tribunal in East Timor, a U.N. body; a forty-year study of legal principles governing State responsibility for torts carried out by the United Nations' International Law Commission (ILC), in extensive consultation with member governments; case law of the International Military Tribunal at Nuremberg (IMT); and expert opinions of foreign international-law experts. While there is some evidence for a knowledge standard in the case law of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda (ICTY/ICTR), those are less persuasive sources for a number of reasons. In any event, they at most demonstrate that there is dispute or uncertainty with respect to the international legal rule, as a number of courts of

appeals have expressly acknowledged. *See, e.g.*, *Sarei*, 2011 WL 5041927 at *25 ("Under international law ... the required *mens rea* for aiding and abetting war crimes is subject to dispute."). Under the standards established in *Sosa* for recognizing claims under the ATS, that dispute or uncertainty might be a reason to reject aiding-and-abetting liability altogether under the ATS. It certainly mandates that if aiding-and-abetting liability is permitted, it must include a mental element no less demanding than purpose.

a. Rome Statute of the International Criminal Court

The view that customary international law requires purpose for aiding-and-abetting liability is most authoritatively evidenced in the Rome Statute of the ICC. July 17, 1998, 37 I.L.M. 999. The Rome Statute expressly requires that such liability extend only to acts conducted for "the purpose of facilitating the commission" of a crime. Art. 25(3)(c), *id.* at 1016. The first ICC decision to interpret this article, handed down in December 2011, holds squarely that "article 25(3)(c) of the Statute requires that the person act with the purpose to facilitate the crime; knowledge is not enough for responsibility under this article." *Prosecutor* v. *Mbarushimana*, Situation in the Democratic Republic of Congo, No. ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶274 (Pre-Trial Chamber Dec. 16, 2011); *see also* Ambos, *Article 25: Individual Criminal Responsibility in International Criminal Law*, *in Commentary on the Rome Statute of the International Criminal Court* 475, 483 (Triffterer ed. 1999) ("it is

clear that purpose generally implies a specific subjective requirement stricter than mere knowledge").[3]

Signed by 139 States and ratified by 120, the Rome Statute reflects the most comprehensive view of contemporary State practice, as consented to expressly by governments. The United States participated extensively in the drafting of the Rome Statute and signed it on December 31, 2000. In particular, the U.S. "was very persistent" about codifying the elements of crimes as that would "accommodate relevant differences between common-law and civil-law systems and it would help to reach consensus in as many areas as possible." Crawford, *The Work of the International Law Commission, in The Rome Statute of the International Criminal Court: A Commentary* 23, 57 (Cassesse, et al., eds. 2002). At the time the Rome Statute was negotiated, the ICTY and ICTR had already issued decisions approving mere knowledge for aiding-and-abetting liability. Yet the governments of the international community—including the United States—rejected that standard and instead established, through Article 25(3)(c), purpose as the necessary mental element for aiding-and-abetting liability.

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[3] The *Mbarushimana* decision also makes clear that the D.C. Circuit's efforts to avoid the plain meaning of Article 25(3)(c) in its endorsement of a knowledge standard are unsupportable. *See Doe*, 654 F.3d at 37-38. The D.C. Circuit also erred in holding that the "the Rome Statute was not meant to affect or amend existing customary international law." *Id.* at 35 (citing Article 10 of the Rome Statute). The restriction of Article 10 applies only to Part 2 on "Jurisdiction, Admissibility, and Applicable Law," whereas Article 25 is found in Part 3 on "General Principles of Criminal Law" and, by its terms, is reflective of customary international law.

U.S. courts have recognized that the ICC Statute constitutes powerful evidence of customary international law on this question. *See, e.g.*, *Aziz*, 658 F.3d at 400 ("[T]he Rome Statute constitutes a source of the law of nations, and, at that, a source whose mens rea articulation of aiding and abetting liability is more authoritative than that of the ICTY and ICTR tribunals."). In *Khulumani* v. *Barclay National Bank Ltd.*, both Judges Katzmann and Korman agreed that the Rome Statute "may ... be taken by and large ... as constituting an authoritative expression of the legal views of a great number of States" with respect to aiding-and-abetting liability. 504 F.3d 254, 276 (2d Cir. 2007). (Katzmann, J., concurring) (quoting *Prosecutor* v. *Furundzija*, No. IT-95-17/1, Judgment, ¶227 (Trial Chamber Dec. 10, 1998)); *id.* at 333 (Korman, J. concurring in part and dissenting in part) (concurring in the section of Judge Katzmann's opinion that "articulates the customary international law standard for aiding-and-abetting based on the Rome Statute"). International courts, including even the ICTY and ICTR, have also recognized the Rome Statute's significance. *See, e.g.*, *Prosecutor* v. *Kunarac*, No. IT-96-23, ¶137, n.239 (Appeals Chamber June 12, 2002) ("[T]he Appeals Chamber observes that the ICC definitions were intended to restate customary international law."). While the ICTY Appeals Chamber ultimately chose not to follow the Rome Statute on this score, it too had to acknowledge the Statute's authoritativeness:

> The [ICC] Statute was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the Sixth Committee of the United Nations General Assembly. This shows that that text is supported by a great number

> of States and may be taken to express the legal position i.e. *opinio iuris* of those States.

Prosecutor v. *Tadic*, No. IT-94-1-A, Judgment, ¶223 (Appeals Chamber July 15, 1999).[4]

b. East Timor

The ICC Statute is not the only document defining the jurisdiction of an international criminal tribunal through which governments have expressed the international community's view that purpose is required for aiding-and-abetting liability. The Regulation for the Special Panels for Serious Crimes in East Timor, promulgated by the United Nations Transitional Administration for East Timor in the wake of atrocities committed there, provided that aiding-and-abetting liability requires "purpose of facilitating the commission of" a crime. *See* 2000 UNTAET Reg. No. 2000/15, art. 14.3(c). The Regulation confirms that, where there is clear evidence of State practice, customary international law mandates purpose as the mental element for aiding and abetting gross violations of human rights.

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[4] It is well-established that "a rule set forth in a treaty [can] becom[e] binding upon a third State as a customary rule of international law, recognized as such." Vienna Convention on the Law of Treaties, art. 38, May 23, 1969, 1115 U.N.T.S. 331, T.S. No. 58 (1980); *see also North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), Judgment, 1969 I.C.J. 3 (Feb. 20). Although the United States has not ratified the Statute, it has not objected to its requirement of purpose for aiding-and-abetting liability, as it could under the persistent objector doctrine to prevent the rule from being cited as evidence of customary international law.

c. International Law Commission

Whereas the ICC Statute and the UNTAET Regulation reflect customary international law on individual criminal responsibility, the ILC has identified customary international law on the civil liability of States for aiding or assisting violations of international law.[5] Because States are typically the principal perpetrators of major human rights violations like the ones at issue here and because the ILC's study concerns civil liability, as does the ATS, the ILC's determination that purpose is necessary to establish aiding-and-abetting liability is particularly persuasive evidence of the relevant international norm.

The ILC's comprehensive study of State practice on this issue, begun in 1964 and completed in 2001, entailed numerous drafts, discussions, and most important, opportunities for governments to comment on proposed principles in order to reflect accurately the actual consensus of the international community. *See Articles on the Responsibility of States for Internationally Wrongful Acts*, U.N. Doc. A/Res/56/83 (Dec. 12, 2001) (Articles on State Responsibility). The United States in particular, responding to one draft of the Articles on State Responsibility providing for responsibility for assistance "that ... is rendered for the commission of an internationally wrongful act carried

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[5] The ILC, established in 1947 by the U.N. General Assembly, is a body of 34 experts on international law elected by the General Assembly for five-year terms. Under Article 15 of the ILC Statute, U.N. Doc. A/CN.4/4/Rev.2 (1982), one of the Commission's two basic functions is "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine."

out by" the direct violator State, emphasized the need for purpose in aiding-and-abetting liability:

> the term ["rendered for the commission"] means to cover the case where an assisting State intends to assist in the commission of an unlawful act. However, the phrase "rendered for" is rather obscure and may be interpreted as not requiring intent. That "rendered for" incorporates an intent requirement should be clarified in the text of the draft article.

State Responsibility: Comments and Observations Received from Governments, U.N. Doc. A/CN.4/488, at 77 (Mar. 25, 1998). Other countries, including Germany and the United Kingdom, endorsed the same view. *Id.* at 76-77. In response to these comments, the ILC altered the draft text to reflect the international consensus in favor of a purpose requirement.

Due to this comprehensive process of identifying State practice, the ILC's Articles on State Responsibility are viewed as an authoritative statement of customary international law by U.S. courts, international courts, and commentators. *See Doe I* v. *Nestle, S.A.*, 748 F. Supp. 2d 1057, 1069 n.11 (C.D. Cal. 2010) ("[t]he views of the International Law Commission have sometimes been considered especially authoritative" in identifying customary international law); *Bosnian Genocide Case*, Judgment, 2007 I.C.J. 47 (applying the ILC's Articles on State Responsibility to determine Serbia's liability for the alleged crimes); *Case Concerning Oil Platforms* (Islamic Republic of Iran v. U.S.), Separate Opinion of Judge Simma, 2003 I.C.J. 161, ¶75 (Nov. 6) (describing the ILC's Articles on State Responsibility

as "authoritative").[6] The U.N. General Assembly adopted the Articles and Commentary on State Responsibility by acclamation and commended them to member States. U.N. Doc. A/Res/56/83.

While the relevant ILC Article, Article 16, uses the phrase "knowledge of the circumstances of the internationally wrongful act," the ILC itself has explained that that phrase requires *purpose* to advance the direct violation. According to the ILC, Article 16 requires that "the aid or assistance must be given with a view to facilitating the commission of [the underlying wrongful] act and must actually do so." International Law Commission, *Responsibility of States for Internationally Wrongful Acts: General Commentary*, U.N. Doc. A/56/10, Supp. No. 10, at 156 (2001). This required mental element

> limits the application of article 16 to those cases where the aid or assistance is clearly linked to the subsequent wrongful conduct. A State is not responsible for aid or assistance under article 16 unless the relevant State organ *intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct* and the internationally wrongful conduct is actually committed by the aided or assisted State.

Id. (emphasis added). This understanding is consistent with the drafting history of Article 16 and, as indicated

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[6] This Court has relied on the ILC's work in other contexts. *See United States* v. *Louisiana*, 394 U.S. 11, 36-60 (1969) (relying extensively on the ILC's articles and commentary on the law of the sea).

above, reflects the views of major States in the international community, including the United States.[7]

d. Nuremberg

While the precise bases of decision in some of the judgments of the International Military Tribunal at Nuremberg are sometimes difficult to discern, at least two of the IMT's leading decisions indicate that mere knowledge that particular conduct might aid in the commission of a crime was insufficient to establish liability for aiding and abetting.

In *The Ministries Case*, the IMT acquitted the Chairman of Dresdner Bank, Karl Rasche, who was charged with aiding and abetting crimes against humanity by financing SS enterprises established to exploit slave labor. Notwithstanding the fact that Rasche provided loans to the SS with knowledge of their activities, the IMT held:

> The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will us[e] the funds in financing enterprises which are employed in using labor in violation of either national or international law? ... Loans or sales of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in

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[7] The Articles and Commentary are equally authoritative statements of customary international law. *See, e.g.*, Damrosch, et al., *International Law: Cases and Materials* 501 (5th ed. 2009) (international tribunals "have likewise considered various parts of the Draft Articles and the ILC's commentary as authoritative expressions of customary law").

> either case, but the transaction can hardly be said to be a crime. Our duty is to try and punish those guilty of violating international law and we are not prepared to state that such loans constitute a violation of that law .... We cannot go so far as to enunciate the proposition that the official of a loaning bank is chargeable with the illegal operations alleged to have resulted from the loans or which may have been contemplated by the borrower.

United States v. *von Weizsacker* (*Ministries Case*), Judgment, XIV *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, 622, 854 (1949). If substantial assistance combined with knowledge of the direct violator's criminal conduct sufficed to establish aiding and abetting, the judgment would have come out the other way.[8]

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[8] In *Doe*, the D.C. Circuit mistakenly concluded that another defendant in the *Ministries Case*, Emil Puhl, was convicted on the basis of mere knowledge. The court concluded that both Rasche and Puhl had only knowledge, but that their culpability differed based on their acts rather than their intent. Rasche, the court believed, merely provided funds, whereas Puhl "had engaged in activities beyond his routine banking duties in order to assist the primary perpetrators." 654 F.3d at 39.

The *Doe* court erred in concluding that Puhl provided greater assistance than Rasche, and that a difference in the actus reus, rather than the mental element, explained the difference in their liability. Neither defendant's acts were inherently unlawful, and Rasche's funds might have provided even more substantial aid than Puhl's activities. The key difference was what their respective acts indicated with respect to their intent. The IMT found that Puhl's "participation was not a major one," but "without doubt he was a consenting participant in part of the execution of the entire plan" of extermination of Jews. XIV *Trials of War Criminals*,

Similarly, in the *Zyklon B Case*, the IMT convicted the lead defendant not merely for knowing that his acts would assist in the crime of genocide by supplying the SS with prussic acid, but for "train[ing] its members how it could be used to kill human beings." *Khulumani*, 504 F.3d at 276 n.11 (Katzmann, J., concurring) (discussing *Trial of Bruno Tesch and Two Others*, *in* 1 *Law Reports of War Crimes Trials* 93 (1946; reprint 1997)); *see also* Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 Nw. U. J. Int'l Hum. Rts. 304, 312 (2008) ("[B]y supplying gas in the knowledge that it would be used to kill human beings, one may infer that one of [defendants'] purposes—admittedly secondary—was to encourage continued mass killings of Jews.").

e. Opinions of international-law experts

The court of appeals also relied on expert opinions submitted by two leading international-law scholars, James Crawford, Whewell Professor of International Law at Cambridge University and sometime Rapporteur of the ILC Articles on State Responsibility, and Christopher Greenwood, previously professor of international law at the London School of Economics and currently a Judge on the International Court of Justice. *See* Pet. App. A-66 to A-68. Both experts concluded, in

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at 621. "He went beyond the ordinary range of his duties to give directions that the matter be handled secretly by the appropriate departments of the bank." *Id.* at 620. These findings indicate that the IMT took Puhl's specific acts to assist the extermination as evidence that he shared the intent of the principal criminals and thus was guilty, whereas Rasche's general loans to the SS and knowledge of its use of slave labor were insufficient to establish such intent.

amicus briefs filed with Second Circuit in the related case in which the court of appeals adopted the purpose standard for aiding-and-abetting liability, that customary international law requires "purpose to facilitate" as the mental element of aiding and abetting. *See* Crawford Amicus Br. 13, *Talisman Energy*, No. 07-16 (2d Cir. May 7, 2007) (aiding and abetting means "act[ing] with intent to assist in a specific wrongful act"); Greenwood Amicus Br. 22, *Talisman Energy*, No. 07-16 (2d Cir. May 4, 2007) (for aiding-and-abetting liability, "[k]nowledge or recklessness is not sufficient. The aid or assistance must be given with the *intention* of facilitating the wrongful act and must make a significant contribution to its commission" (emphasis in original)).

f. ICTY/ICTR

In concluding that knowledge, rather than purpose, suffices to establish aiding-and-abetting liability, the D.C. Circuit relied principally on decisions from the ICTY and ICTR. *See Doe*, 654 F.3d at 33-34. While a number of decisions from those tribunals have endorsed a knowledge standard, they are plainly inadequate to support adoption of such a standard under the ATS for several reasons.

First, while decisions of respected international tribunals may provide some evidence of customary international law, under the authoritative article 38 of the ICJ Statute they represent only "subsidiary means for the determination of rules of law." That makes sense because, unlike sources such as the Rome Statute and the ILC Articles on State Responsibility, they do not reflect the direct involvement of governments, and thus cannot provide as accurate a reflection of the practice

and legal views of States. *Accord* Nuremberg Scholars Br. 11.[9]

Second, the ICTY and ICTR cases addressing aiding-and-abetting liability do not involve corporations, but instead typically involve military leaders, who were present at the site of the alleged crimes even though they did not themselves commit the underlying violation. *See, e.g.*, *Prosecutor* v. *Blaskic*, No. IT-95-14-A, Judgment, ¶47 (Appeals Chamber July 29, 2004) ("[T]he mere presence at the crime scene of a person with superior authority, such as a military commander, is a probative indication for determining whether that person encouraged or supported the perpetrators of the crime."); *Prosecutor* v. *Furundzija*, No. IT-95-17/1-T, Judgment, ¶¶124-130, 232 (Trial Chamber Dec. 10, 1998) (noting that the defendant was a militia leader and was present in the room where his colleagues beat

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[9] The early decisions of the ICTY and ICTR adopting a knowledge standard appeared before the adoption of the Rome Statute of the ICC. Some of those decisions relied in part on the ILC's Draft Code of Crimes Against the Peace and Security of Mankind, *in Yearbook of the International Law Commission, 1996*, vol. II, pt. 2, article 2(3)(d) of which provided criminal responsibility for an individual who "knowingly aids, abets or otherwise assists, directly and substantially, in the commission of ... a crime, including providing the means for its commission." *See, e.g.*, *Furundzija*, Judgment, ¶242; *Prosecutor* v. *Tadic*, No. IT-94-1-T, Opinion and Judgment, ¶688 (Trial Chamber May 7, 1997). But the Draft Code (unlike the Articles on State Responsibility) was never adopted by the General Assembly. Instead the General Assembly simply made it available to the States negotiating what became the Rome Statute. *See* U.N. Doc. A/Res. 51/160 (Dec. 16, 1996). Those negotiations of course led to the adoption of a mental element of purpose, not knowledge. The ICTY and ICTR in effect relied on a bill from early in the legislative process rather than the ultimately enacted law.

and tortured their victims). Cases such as *Blaskic* and *Furundzija* are as much about command responsibility of a superior military officer over his subordinates at the scene of the crime as they are about general principles of aiding-and-abetting liability that would be appropriate to apply to the very different circumstance of organizational defendants often far removed from the scene.

Third, while ICTY and ICTR tribunals have held that knowledge is sufficient for aiding-and-abetting liability, they have required not simply knowledge of the direct violator's criminal acts, but specific knowledge that the defendant's acts of assistance would facilitate the specific crime of the principal. *See Prosecutor* v. *Vasiljevic*, No. IT-98-32-A, Judgment, ¶102(ii) (Appeals Chamber Feb. 24, 2004) ("In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal."); *Tadic*, No. IT-94-1-A, Judgment, ¶229 (an "aider and abetter carries out acts specifically directed to assist ... the perpetration of a certain specific crime); *see also Prosecutor* v. *Akayesu*, No. ICTR-96-4, Judgment, ¶485 (Trial Chamber Sept. 2, 1998) (holding that a person accused of aiding and abetting genocide had to have the specific intent to commit genocide). Thus, even under this standard of mens rea, Petitioners' general and conclusory allegations would be insufficient to establish aiding-and-abetting liability.

Finally, the ICTY and ICTR decisions suggest at most that customary international law is unsettled with respect to the mental element for aiding and abetting certain kinds of human rights violations. Under the standards established in *Sosa* for recognizing claims under the ATS, that uncertainty might be a reason to

reject aiding-and-abetting liability altogether under the ATS. It certainly mandates that if aiding-and-abetting liability is permitted, it must include a mental element no less demanding than purpose.

g. General principles of law among civilized nations

Petitioners also rest their ATS claims to some degree on so-called general principles of law, that is, not State practice with respect to international rules, but rather principles that are nearly universal in the domestic legal systems of countries around the globe. Pet. Br. 43-47.[10] When one looks to this potential source of international law, again one finds not the universal consensus required by *Sosa*, but instead wide variation and disagreement about the mental element required for aiding-and-abetting liability. This disagreement became apparent during the debates leading up to the adoption of the Rome Statute. *See* Cassel, 6 Nw. U. J. Int'l Hum. Rts. at 310 ("There was thus a longstanding disagreement between advocates of a 'knowledge' standard and those who preferred an 'intent' test."). And it is reflected in a study of general principles cited in Petitioner's own brief. *See* Ramasastry & Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law, A Survey of Sixteen*

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[10] General principles of law are widely viewed as secondary or subsidiary to treaties and custom as a sources of international legal rules. *See* Pet. App. A-62 n.43; *Restatement (Third) of Foreign Relations Law of the United States* §102 cmt. *l* (1987) ("General principles are a secondary source of international law, resorted to for developing international law interstitially in special circumstances.")

Countries 17-20 (2006) ("there are differences as to the type of intent an accomplice must possess") (cited in Pet. Br. 54).[11]

2. The additional reasons for judicial caution identified in *Sosa* also require a mental element of purpose, not knowledge

Under a straightforward application of the principle established in *Sosa* that the ATS permits actions resting only on international norms that "have a content as definite as, and an acceptance as widespread" as the three 18th-century paradigms that would have been familiar to the First Congress, 542 U.S. 760 (Breyer, J., concurring in part and concurring in the judgment), the absence of a widely accepted international consensus embracing a mens rea standard more expansive than purpose for aiding-and-abetting liability forecloses the application of a knowledge or recklessness standard under the ATS. *See supra* Part II.C.1. But the *Sosa* Court explained that "[t]his requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of international law." 542 U.S. at 733 n.21. Thus, even if there were universal acceptance of a particular men-

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[11] When it comes to corporate complicity in particular, there is also disagreement regarding the level of management where such intent or knowledge must be proven. For instance, English law allows corporate liability only if a member of its senior management (a "controlling mind") has the required mental element. *See, e.g., Tesco Supermarkets Ltd.* v. *Nattrass*, [1972] A.C. 153 (H.L.). In contrast, Australian law provides that a corporation can be convicted in certain circumstances for failing to create a corporate "compliance culture." Criminal Code Act 1995 (Austl.), §12.3(c), (d).

tal element for aiding and abetting the international-law violations alleged, several of the reasons identified in *Sosa* for exercising "judicial caution" in expanding ATS liability would independently counsel against recognition of a mental element for aiding and abetting any less demanding than purpose. *Id.* at 725; *see also id.* at 746-747 (Scalia, J., concurring in part and concurring in the judgment) (agreeing with these principles of judicial restraint).

First, in insisting upon a "cautio[us]" approach to judicial enlargement of ATS liability, 542 U.S. at 725, *Sosa* pointed to changes since the ATS's enactment in our understanding of federal common law and the role of federal courts in fashioning it. The Court explained that "the prevailing conception of the common law has changed since 1789" and that there is now "a general understanding that the [common] law is not so much found or discovered as it is either made or created." *Id.* at 725. Active judicial involvement in making substantive law under the ATS would be in significant tension with that change, the Court cautioned, because a judge deciding an ATS claim "in reliance on an international norm will find a substantial element of discretionary judgment in the decision," *id.* at 726, inviting a return to discarded methods of common law reasoning. In the wake of *Erie Railroad. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and its rejection of a general federal common law, federal judges now typically "look for legislative guidance before exercising innovative authority over substantive law." 542 U.S. at 726. It would be "remarkable," the Court said, if the federal judiciary nonetheless engaged in robust substantive lawmaking under the ATS unguided by legislative standards. *Id.*

Those concerns are directly implicated here. As we have explained above and, as courts have acknowl-

edged, there is a substantial "dispute" under international law with respect to the "required *mens rea* for aiding and abetting" and whether a standard broader than purpose is permissible. *Sarei*, 2011 WL 5041927, at *25; *see supra* pp. 7-8. That dispute, moreover, involves interpreting and reconciling various international documents and writings, as well as arguably conflicting decisions of international tribunals. *See, e.g.*, *Doe*, 654 F.3d at 32-39 (canvassing multiple sources of international law and concluding that knowledge is the appropriate standard); *Khulumani*, 504 F.3d at 270-279 (Katzmann, J., concurring) (canvassing the same sources of international law and concluding that purpose is the appropriate standard). For federal judges to resolve this deep disagreement and, with no guidance from Congress, to embrace an expansive mens rea standard would invite the very type of standardless and indeterminate common law decision-making that this Court warned against in *Sosa*. *See, e.g.*, *Doe*, 654 F.3d at 86 (Kavanaugh, J., dissenting in part) (noting that, because customary international law is "notoriously vague and somewhat ill-defined," there is a risk that "courts will be left with little more than their own policy preferences when determining the scope of an ATS/customary international law claim").

Second, the Court in *Sosa* pointed to "the potential implications for the foreign relations of the United States" from expanding liability under the ATS, instructing that courts should be "wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." 542 U.S. at 727. The Court warned that "many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences" and that such efforts "should be

undertaken, if at all, with great caution." *Id.* at 727-728. Such potential judicial interference with U.S. foreign policy would be particularly inappropriate given that federal courts lack a "congressional mandate to seek out and define new and debatable violations of the law of nations." *Id.* at 728; *see id.* (noting that Congress has not "affirmatively encouraged greater judicial creativity" in this arena).

Those considerations are also apposite here, and they compel rejection of a mens rea standard any more expansive than purpose. As we have explained, whether international law embraces a mens rea standard beyond purpose is, at best, unsettled. The issue, apart from dividing U.S. federal courts, is the subject of continuing controversy in the international community. *See supra* pp. 25-28. For federal judges to insert themselves into this controversy and to resolve these contentious issues of international law in favor of a broad standard of liability—for example, by disparaging the force of the Rome Statute and instead crediting decisions of the ICTY and ICTR, *compare Doe*, 654 F.3d at 35-39, *with Khulumani*, 504 F.3d at 275-276 (Katzmann, J., concurring)—would risk interfering with the constitutionally assigned roles of the political branches in deciding how such questions of law and diplomacy should be resolved, consistent with U.S. foreign policy objectives. *See, e.g.*, U.S. Const. art. I, §8, cl. 10 (giving Congress the authority "[t]o define and punish ... Offences against the Law of Nations"); *id.* art. II, §2, cl. 1.

Third, broad jurisdiction under the ATS could offend principles of international comity where, as here, "foreign persons injured abroad bring suit in the United States under the ATS, asking courts to recognize a claim that a certain kind of foreign conduct violates an international norm." 542 U.S. at 761 (Breyer,

J., concurring in part and concurring in the judgment). Justice Breyer explained that, even when there is universal agreement regarding "certain universally condemned behavior," there must also be "procedural agreement that universal jurisdiction exists to prosecute" such behavior. Otherwise ATS litigation could "undermine the very harmony that it was intended to promote." *Id.* at 761, 762. Indeed, even prior to *Sosa*, concerns had been raised within the international community about broad assertions of extraterritorial jurisdiction by U.S. courts under the ATS. Three judges of the International Court of Justice, for example, including the U.S. judge, have noted that "unilateral exercise of the function of guardian of international values" by U.S. courts in ATS cases involving alleged violations of international law by "non-nationals overseas" "has not attracted the approbation of States generally." *Arrest Warrant of April 11, 2000* (Dem. Rep. Congo v. Belg.), Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, 2002 I.C.J. 3, ¶48 (Feb. 14); *see also Jones* v. *Saudi Arabia* [2007] 1 A.C. 270, 286, ¶20 (H.L.) ("the [ATS] decisions are ... important only to the extent that they express principles widely shared and observed among other nations. As yet, they do not").

This concern with comity is relevant here. Even were there substantive consensus that aiding and abetting based on knowledge or recklessness is universally condemned (and there is not), there is no evidence of which we are aware demonstrating a procedural consensus within the international community that universal jurisdiction exists with respect to such conduct. *See Sosa*, 542 U.S. at 762-763 (Ginsburg, J., concurring in part and concurring in the judgment). Absent such a consensus, the exercise of extraterritorial jurisdiction by U.S. courts over such conduct could

provoke discord, not promote harmony, within the international community.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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